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March 10, 2005

Miles Mayhew
DPD Land Use Planner

Thank you for the opportunity to comment on the Environmentally Critical Areas Draft Proposed Code. My comments draw heavily from my experience as a hearing examiner hearing appeals and variances to environmental critical area ordinances in counties and cities in Western Washington. Also, a few years ago my wife and I as residents in Seattle filed an appeal to a SEPA determination that focused on the existing ECA ordinance. That appeal experience was followed by interacting with DCLU regarding the interpretation of “exemptions” and “exceptions” in the ECA ordinance.

Generally, the City has improved the language of the ECA. The distinctions between environmental critical areas that constitute hazards versus natural resources are much improved. My comments focus on three areas:

Exemption Provisions:

- Corrections to the “exemption” provisions to avoid interpretation problems still exist.

There are too many proviso’s that change the application of code sections. Some proviso’s may conflict with others, or result in circular reasoning. Consequently, interpretation is extremely difficult. In one instance, a series of exemptions in 25.09.045 use parallel paragraph structures in all but one subsection. The one subsection (§.045.H.) is similar to the subject of our SEPA appeal, and which was a difficult interpretation issue. I have taken the liberty to suggest a re-write of the subsection H.

Public versus Private Projects:

- The treatment of public versus private projects suffers from inadequate control.

The subject of public versus private standards came up at one of the Comprehensive Plan public meetings. The audience disagreed with the proposal to delete a former Plan goal that would have the City provide leadership by working at a higher standard. The Draft Proposed ECA Ordinance contains too much relaxation of standards for City agencies. Please note that the language in Section 25.09.010, Purpose of the Chapter, clearly states that “*any particular person, or class, or group of persons*” would not “*be especially protected or assisted by the terms or provisions of this chapter.*” Some procedural relaxation may be suitable—but care must be taken to allow DPD to maintain control and oversight without giving City agencies special treatment.

City Programs to Remove Fish Barriers:

- There is a lack of recognition of the City's programs to remove barriers to fish, together with the conflicts with the Endangered Species Act's 4(d)Rule provisions.

The City has programmed, budgeted and is implementing the removal of fish barriers in its major creeks. That City commitment should be recognized in the ECA Draft Proposed Code. In particular, the Endangered Species Act [ESA] has listed certain groups of salmon and steelhead as threatened, and the National Marine Fisheries Service [NMFS] adopted a "take" rule under Section 4(d) of the ESA, which became effective January 8, 2001 for the Puget Sound Evolutionary Significant Unit [ESU].4(d)Rule, What is known as the 4(d) Rule now applies to the activities of the City. More importantly, the 4(d) Rule's prohibition on "take" applies to the activities of everyone. That means every citizen, business, and city, county and state government. Every action must properly consider the guidelines and ultimate application of the 4(d) Rule. One direct conflict in the City's Draft Proposed Code is the statement that "*trails providing access to a creek or wetland area*" constitute a public benefit—when in fact, the guidelines for the 4(d) Rule describe such trails as "not favored" due to their potential of habitat degradation.

Draft Proposed Code Suggestions:

The excerpted Code Sections are presented here with proposed changes. The text is copied verbatim, but modified in format as follows:

- Original deleted text is grayed to facility readability.
- Proposed deletions are indicated by double strike out.
- Proposed additions are indicated by double underscore.
- Personal comments are presented in "Technical" font.
- Whole subsections proposed as a replacement will be boarded top and bottom with asterisks * * * *.

ENVIRONMENTALLY CRITICAL AREAS – Draft Proposed Code with Proposed Changes

25.09.015 Administration.

A. The Director shall administer and interpret the provisions of this chapter, except as specifically provided. The provisions of Section 23.88.020 apply to a decision by the Director as to the meaning, application, or intent of any provision of this chapter.

B. The Director shall determine whether development is subject to this chapter. The Director may also consult with other City departments and state and federal agencies as necessary to obtain additional technical and environmental review assistance.

C. The Director shall review and analyze all applications for all permits subject to this chapter that are issued by the Department of Planning and Development. Such applications shall be approved only after the Director is satisfied the applications comply with this chapter.

D. Every other City department issuing a permit for development in environmentally critical areas or their buffers shall require the use of best management practices to prevent impacts to environmentally critical areas and their buffers and to meet the intent of this chapter. All such City departments shall maintain records documenting compliance with this subsection D.

Question: What other city departments issue permits for development?

25.09.040 Application of ~~((standards))~~ the chapter.

~~((The standards of this chapter shall apply to all public and private proposals for new structures, additions to structures, short subdivisions and subdivisions, grading and drainage activity, and tree and vegetation removal per Section 25.09.320 located on either public or private property within environmentally critical areas and their buffers. Public projects proposed by any public agency shall comply with the standards of this chapter. Projects shall be exempted from the requirements of the chapter when the following situations and/or conditions apply:))~~

A. This chapter applies to any development, platting, and lot boundary adjustment carried out by any person on publicly or privately owned parcels containing an environmentally critical area or buffer.

B. Location of environmentally critical areas and buffers.

1. Environmentally critical areas are defined in Section 25.09.020, and buffers are described in Section 25.09.160 and Section 25.09.180. Environmentally critical areas are mapped whenever possible. These maps are advisory. The Director may update or amend the maps by Director's Rule.

2. The Director shall determine whether a parcel contains an environmentally critical area or buffer before requiring a complete application under Section 25.09.330, or determining whether the work is exempt under Section 25.09.045. In determining whether a parcel contains an environmentally critical area or buffer, the Director may consider the environmentally critical areas maps, site surveys, topographic maps, technical environmental analysis, and any other information the Director determines necessary.

25.09.045 Exemptions.

A. 1. Activities described in subsections D to J below are exempt from the provisions of this chapter, except Sections 25.09.015 and .040 and as otherwise provided in this section.

The catch-all phrase: "and as otherwise provided in this section" can be troublesome unless care is taken to assure that each and every such provision is clearly identified. Do not create a need for interpretation.

A detail: It would be more correct to state "D through J".

2. ~~((A))~~ An application for an exemption can be made only as a component of a specific proposed development. The applicant for an exemption shall provide all information requested by the Director and demonstrate that the work qualifies for the exemption. The

Director shall determine whether work is exempt and may impose conditions on the work to protect environmentally critical areas and buffers or other property.

~~((b. The application and review requirements in subsection A2a do not apply to activities undertaken by City agencies.))~~

§.040.B.2 and §.045.A.2.a are compatible as written; however, §.045.A.2.b appears to undo the purpose of the chapter by categorically exempting City agencies from application and review requirements. This wording by-pass' subsections D through J without any apparent reason. §.045.A.2.b should be eliminated.

3. There shall be no notice or appeal of decisions made under this section.

B. All exempt activities shall be undertaken using best management practices; the applicant shall maintain records documenting compliance with this subsection B.

C. The enforcement provisions of this chapter apply to all exempt activities in this section.

D. Development that does not encroach within, alter, or increase the impact to the environmentally critical area or buffer on the parcel where the development occurs is exempt from the provisions of this chapter.

~~((A))E. ((When the Director determines there is an emergency threatening the public health, safety and welfare;))~~ Work directly related to ending a condition that (1) is an immediate threat to the public health, safety and welfare, or creates an immediate risk of damage to public or private property and (2) requires remedial or preventive action in a timeframe too short to allow compliance with the application provisions of this chapter is exempt from those provisions, provided that the work is the minimum work necessary to end the condition and the work is consistent with the development standards of this chapter to the extent practicable. Once the Director determines that the condition no longer meets these criteria, all work is subject to the provisions of this chapter, including but not limited to its application requirements, its development standards, and any requirements for technical reports and reviews for work that was exempt at the time it was performed.

~~((B))F. Maintenance, repair, renovation, or structural alteration of an existing structure ((structures in existence on October 31, 1992, the effective date of the ordinance codified in this chapter, unless otherwise prohibited by law.)) that does not further alter or increase the impact to, or encroach further within an environmentally critical area or buffer is exempt from the provisions of this chapter. ((Expansion or extension in any manner which increases the extent of nonconformity with the environmentally critical area provisions of the chapter shall not be permitted. When these structures are damaged by an act of nature, they may be rebuilt or replaced within one (1) year or the act of nature provided that the new construction or related activity does not further intrude into an environmentally critical are or required buffer and is subject to the flood hazard areas reconstruction restrictions;))~~

~~((C. New accessory structures and additions to structures whose developmental coverage does not exceed a cumulative addition of seven hundred and fifty (750) square feet of impervious surface after October 31, 1992, the effective date of the ordinance codified in this chapter, provided the addition is not constructed over a watercourse, water body or wetland;))~~

~~((D. When the applicant demonstrates to the satisfaction of the Director, through site surveys, topographic maps, technical environmental analysis, and other means as determined necessary by the Director that either one of the following situations apply:))~~

~~((1. The site contains no environmentally critical areas as defined in Section 25.09.020, or))~~

~~((2. The proposed development and associated land disturbing activity, including developmental coverage, does not occur within the area of the site designated as environmentally critical and any required buffer as defined in Section 25.09.020;))~~

~~((E. Normal and routine operation, maintenance, remodeling, and repair of existing public facilities and utilities, including the maintenance, vegetation management and revegetation of public parkland and open spaces, when undertaken pursuant to best management practices to avoid impacts to environmentally critical areas;~~

~~F. The following electric, natural gas, cable communications, telephone, public facility and utility, and right of way improvement projects, with the Director's approval of the location and limits of the project, only when the project is not a prerequisite to development. The exemption shall only be approved when the project is undertaken pursuant to best management practices to avoid impacts to environmentally critical areas, and when it can be demonstrated that:~~

~~1. No practicable alternative exists;~~

~~2. The encroachment into a critical area is minimized to the greatest extent practicable; and~~

~~3. Mitigation measures are employed before, during and after construction;))~~

G. Rebuilding or replacing structures, except retaining walls and similar structures, that are destroyed by an act of nature is exempt from the provisions of this chapter, provided that action toward the rebuilding or replacement is commenced within one (1) year of the act of nature, that the rebuilding or replacement is diligently pursued, and that the new construction or related activity does not further encroach into, further alter, or increase the impact to an environmentally critical area or buffer and complies with restrictions on flood hazard areas reconstruction.

The following §.045.H suffers from many of the same problems as the existing ordinance and should be replaced as noted below:

H. 1. a. The work is not a prerequisite to other development;

b. No practicable alternative to the work with less impact on the environmentally critical area or buffer exists; and

c. The work does not pose an unreasonable threat to the public health, safety or welfare on or off the parcel.

2. The Director's decision shall include the approved location and limits of the work and as a condition of approval shall require specific mitigation measures before, during, and after construction, except when the work is exempt from the Director's review under subsection A2a, above.

3. The provisions of this subsection H apply to the following activities:

a. Relocation of electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of fifty-five thousand (55,000) volts or less only when required by a governmental agency,

b. Relocation of natural gas, cable communications, gas, telephone facilities, and public utility lines, pipes, mains, equipment or appurtenances only when required by a governmental agency,

c. Installation or construction in improved public road rights-of-way, and replacement, operation or alteration, of all electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of fifty-five thousand (55,000) volts or less,

d. Installation or construction in improved public road rights-of-way, and replacement, operation, repair or alteration of all natural gas, cable communications, telephone facilities, and public utility lines, pipes, mains, equipment or appurtenances,

e. Public projects designed to enhance ~~((streams))~~ riparian corridors and wetlands and their buffers, including stormwater-related functions, that require a Hydraulic Project Approval from ~~((either))~~ the Washington Department~~((s))~~ of Fisheries ~~((or))~~ and Wildlife. ~~((and))~~

f. Public projects, ~~((that promote a public objective,))~~ where the intrusion into the environmentally critical area or buffer benefits the public, such as trails providing access to a creek or wetland area, when located and designed to ~~((minimize))~~ keep environmental disturbance to ~~((the greatest extent possible))~~ a minimum.

Recommended Revised Subsection H:

The following is a recommended replacement for subsection H:

Note that ¶f is deleted in my proposed revised subsection H, which is my preference. Paragraphs a through e refer to generally linear facilities. The public projects described in ¶f do not have an inherent public purpose—rather the inclusion appears aimed at special treatment. Moreover, is in conflict with the ESA 4(d) Rule guidelines that do not favor trails along creeks.

* * * * *

H. 1. The following activities are exempt from the provisions of this chapter; subject to the provisions of subsections 2 and 3:

a. Relocation of electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of fifty-five thousand (55,000) volts or less only when required by a governmental agency,

b. Relocation of natural gas, cable communications, gas, telephone facilities, and public utility lines, pipes, mains, equipment or appurtenances only when required by a governmental agency,

c. Installation or construction in improved public road rights-of- way, and replacement, operation or alteration, of all electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of fifty-five thousand (55,000) volts or less,

d. Installation or construction in improved public road rights-of- way, and replacement, operation, repair or alteration of all natural gas, cable communications, telephone facilities, and public utility lines, pipes, mains, equipment or appurtenances,

e. Public projects designed to enhance ~~((streams))~~ riparian corridors and wetlands and their buffers, including stormwater-related functions, that require a Hydraulic Project Approval from ~~((either))~~ the Washington Department~~((s))~~ of Fisheries ~~((or))~~ and Wildlife, ~~((and))~~

~~((f. Public projects, ((that promote a public objective,)) where the intrusion into the environmentally critical area or buffer benefits the public, such as trails providing access to a creek or wetland area, when located and designed to ((minimize)) keep environmental disturbance to ((the greatest extent possible)) a minimum.))~~¹

2. a. The work is not a prerequisite to other development;

b. No practicable alternative to the work with less impact on the environmentally critical area or buffer exists; and

c. The work does not pose an unreasonable threat to the public health, safety or welfare on or off the parcel.

3. The Director's decision shall include the approved location and limits of the work and as a condition of approval shall require specific mitigation measures before, during, and after construction, except when the work is exempt from the Director's review under subsection A2~~((s))~~, above.

* * * * *

¹ The alternative would be: f. Public projects, ~~((that promote a public objective,))~~ where the intrusion into the environmentally critical area or buffer benefits both the habitat and the public, ~~((such as trails providing access to a creek or wetland area,))~~ and when located and designed to ~~((minimize))~~ keep environmental disturbance to ~~((the greatest extent possible))~~ a minimum.

I. Normal and routine operation, maintenance, remodeling, and repair of existing public facilities and utilities is exempt from the provisions of this chapter when these activities do not result in substantial disturbance of environmentally critical areas or buffers.

J. 1. Normal and routine (a) pruning, (b) tree and vegetation maintenance and management, and (c) revegetation are exempt from the provisions of this chapter when they result in no significant adverse environmental impacts and when they are carried out in parks, public utility right of ways, and publicly owned open spaces by the public agencies, including City agencies, that are responsible for them.

2. The application and approval requirements in subsection A2 do not apply to activities under this subsection J.

25.09.050 City Projects.

A. "City project" means all work described in Section 25.09.040 that is undertaken by a City agency. A City project shall comply with all provisions of this chapter unless the project is exempt under Section 25.09.045, or the City agency undertaking the work determines that the City project complies with subsection B.

B. 1. This subsection B applies to a City project where the City agency undertaking the work finds:

a. The City project is not a prerequisite to further development;

b. No practicable alternative to the City project with less impact on the environmentally critical area or buffer exists;

c. The intrusion into the environmentally critical area or buffer benefits both the habitat and the public(~~(, such as trails providing access to a creek or wetland area))~~); and

d. The City project does not pose an unreasonable threat to the public health, safety or welfare on or off the parcel.

2. The City agency undertaking the work pursuant to this subsection B shall:

a. Mitigate impacts to all environmentally critical areas and their buffers before, during, and after construction;

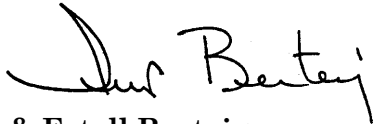
b. Use best management practices to keep impacts to environmentally critical areas and their buffers to a minimum;

c. Protect and enhance vegetation and trees pursuant to an approved tree and vegetation plan consistent with best management practices. The plan shall be prepared by a qualified expert with experience related to the type of environmentally critical area or buffer where work will occur. In landslide-prone areas of the plan shall also be approved by a geotechnical engineer or geologist licensed in the state of Washington with experience in analyzing geological hazards related to slope stability and vegetation removal on steep slopes.

3. The City agency undertaking the work shall maintain records documenting compliance with subsections B1 and B2 by the City agency, including, but not limited to, the specific mitigation measures used and the way in which best management practices are used.

Thank you for the opportunity to comment. We just learned that the deadline to comment is not March 17, 2005. There may be other amendments and comments that we would like to make.

Sincerely,

A handwritten signature in black ink, appearing to read "Irv Berteig". The signature is fluid and cursive, with the first name "Irv" written in a stylized, looped manner and the last name "Berteig" written in a more standard cursive script.

Irv & Estell Berteig